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## The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem

Charlie D. Stewart  
*University of Michigan Law School*

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## COMMENT

### THE RHETORICAL CANONS OF CONSTRUCTION: NEW TEXTUALISM’S RHETORIC PROBLEM

Charlie D. Stewart\*

*New Textualism is ascendant. Elevated to prominence by the late Justice Antonin Scalia and championed by others like Justice Neil Gorsuch, the method of interpretation occupies an increasingly dominant place in American jurisprudence. Yet, this Comment argues the proponents of New Textualism acted unfairly to reach this lofty perch. To reach this conclusion, this Comment develops and applies a framework to evaluate the rhetoric behind New Textualism: the rhetorical canons of construction. Through the rhetorical canons, this Comment demonstrates that proponents of New Textualism advance specious arguments, declare other methods illegitimate hypocritically, refuse to engage with the merits of their opponents’ arguments, and believe their method provides the best plain meaning.*

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## INTRODUCTION

For as long as legal texts have existed, there has been a battle over how to interpret them. Spanning from early Blackstonian textualism, to intentionalism, to Hart and Sacks purposivism, the debate is spirited and has been well fought for centuries. Over the last few decades, however, the debate has largely quieted with the rise and dominance of the New Textualist school of interpretation. Although an oversimplification—since New Textualism has nuances—the doctrine “in its purest form[ ] begins and ends with what the text says and fairly implies.”<sup>1</sup>

This rise of New Textualism, championed by the late Justice Antonin Scalia and by Justice Neil Gorsuch,<sup>2</sup> is a story of rhetoric as much as one of interpretive technique. Justice Scalia, in particular, led the charge to delegitimize the use of all other methods of statutory interpretation as unprincipled and akin to “looking over the faces of the crowd at a large cocktail party and picking out your friends.”<sup>3</sup> Indeed, it seems Justice Scalia made it his life’s work to supplant traditional methods of interpretation with New Textualism.<sup>4</sup> By focusing on the text, he claimed, judges would be more constrained, principled, and consistent.<sup>5</sup>

But like any other mode of statutory interpretation, New Textualism has advantages and disadvantages. There is significant and growing evidence that New Textualist methods do not impose a greater constraint on judges than do any other methods of interpretation.<sup>6</sup> Nevertheless, a focus on the text *is* legitimate when interpreting statutes. This Comment contends that the corresponding *rhetoric* behind New Textualism is what poses a problem. Prominent voices in the New Textualist movement often shut down the debate by advancing their own specious arguments while calling other methods illegitimate or unprincipled. Although claiming the superiority of one’s

1. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 16 (2012).

2. While eulogizing Justice Scalia, Justice Gorsuch said, “much has changed [in the last three decades], giving way to a return to a much more traditional view of the judicial function, one in which judges seek to interpret texts as reasonable affected parties might have done rather than rewrite texts to suit their own policy preferences.” Neil M. Gorsuch, Lecture, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 *CASE W. RES. L. REV.* 905, 906 (2016). Justice Gorsuch would go on to extol the virtues of a New Textualist mindset. *See id.* at 905–15.

3. Robert Barnes, *Supreme Court Justice Antonin Scalia Dies at 79*, *WASH. POST* (Feb. 13, 2016), [https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c\\_story.html?utm\\_term=.a7d88d8e5dd6](https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html?utm_term=.a7d88d8e5dd6) [<https://perma.cc/F977-P7M4>] (paraphrasing a quote widely attributed to Justice Scalia).

4. A regime the late justice referred to as, “The Prevailing Confusion.” SCALIA & GARNER, *supra* note 1, at 9.

5. *See generally id.*

6. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 *COLUM. L. REV.* 531, 532–37 (2013) (reviewing SCALIA & GARNER, *supra* note 1).

own method of interpretation is part of any debate, New Textualists frequently go too far. These advocates attempt to completely delegitimize other methods of interpretation, allowing them to game the system in their favor.

Unfortunately, no lionizing force like the late Justice Scalia is advocating for the use of intentionalist or purposivist methods of interpretation. Indeed, it appears even nontextualists have ceded ground to the New Textualists.<sup>7</sup> This is likely because no sane jurist would ever call focusing on the text illegitimate, since the text is where the controversy originally arises. This allows New Textualists to advance their method of interpretation along a united front against a largely faceless and disorganized enemy.<sup>8</sup>

This Comment does not advance the proposition that the text of a statute or document should be disregarded or even discounted in the interpretive process. On the contrary, the text is an excellent place to start and oftentimes an integral component of the interpretive puzzle. This Comment instead focuses on the *rhetoric* used by the advocates of New Textualism. Further, this Comment does not endorse any particular view of statutory interpretation beyond the proposition that all generally accepted methods should be on the table and that all sources of information should be at least considered unless empirically shown to be unreliable or untrue.<sup>9</sup>

For the time being, the New Textualists appear to have won the interpretive war. The use of the canons of construction<sup>10</sup> over the past twenty-five years has increased significantly, both at the Supreme Court and elsewhere.<sup>11</sup>

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7. See, e.g., *Yates v. United States*, 135 S. Ct. 1074 (2015) (plurality opinion) (in which traditionally nontextualist Justices Ginsburg and Kagan wrote the plurality and dissenting opinions, respectively, each of which applies textual arguments in interpreting the term “tangible object”); see also *infra* note 51 and accompanying text.

8. See Elliott M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J.L. & PUB. POL’Y 983, 1004 (2007) (“[N]ewer textualism does not yet have a significant opposition.”); see also David K. Ismay & M. Anthony Brown, *The Not So New Textualism: A Critique of John Manning’s Second Generation Textualism*, 31 J.L. & POL. 187, 189 (2015) (“Despite [John F.] Manning’s status as the leading academic proponent of textualism and the substantial body of scholarly work on textualism he has published, few have attempted a thorough critique of his theory of textualism. A comprehensive assessment of Manning’s work is overdue.”(footnote omitted)).

9. See *infra* Section II.A. For example, courts often utilize a canon against surplusage, which tells courts to provide each word in a statute with an independent meaning, even if the words appear identical on their face. See *infra* notes 87–90 and accompanying text. But empirical evidence shows that legislatures often include additional terms (or surplusage) intentionally, in a belt-and-suspenders approach. See *infra* notes 91–95 and accompanying text.

10. The canons of construction are a series of judicially made semantic and substantive tools that are utilized by judges when interpreting a statute. The number of canons is unclear but may be in the hundreds.

11. Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. (forthcoming 2018) (manuscript at 2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3117143](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117143) [<https://perma.cc/C2LJ-MXPU>] (citing Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 191 (2017) (“There is now virtually unanimous agreement among federal judges that text always comes first.”)).

Some states have even codified the canons.<sup>12</sup> But this Comment argues that the rhetoric surrounding New Textualism made it an unfair fight. Although the New Textualists may have won, their tactics were damaging to the interpretive debate. Their victory may prove to be pyrrhic in the long run.

Part I explores the history of statutory interpretation and the rise of New Textualism. Part II develops a framework for critiquing the rhetoric behind New Textualism, applies it to examples by its leading proponents, and concludes that New Textualists' rhetoric damages the debate around statutory interpretation.

### I. HOW WE GOT INTO THIS MESS

The history of statutory interpretation is a story of confusion. But the problem of how to interpret ambiguous text is more acute today due to the profusion of laws that accompanied the rise of the administrative state.<sup>13</sup> Instead of uncovering meaning from "natural" sources<sup>14</sup> or relying primarily on the common law, judges today regularly encounter regulations and statutes. The battle of statutory interpretation is no longer a niche area of law. Rather, it touches nearly every area of the legal world and has profound implications for the interpretation and enforcement of laws.<sup>15</sup> How that battle is fought, then, is of paramount importance.

This Part traces the history of American statutory interpretation. It begins with modern statutory interpretation's prehistory in England and then winds its way through the various epochs of American interpretation. It culminates with an overview of New Textualism's ascendance.

Sir William Blackstone may have detailed one of the first statutory interpretation regimes in the seminal *Commentaries on the Laws of England*.<sup>16</sup> In Blackstone's view:

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the

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12. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1787, 1792 n.152 (2010).

13. See generally Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 *J. ECON. LITERATURE* 401 (2003) (discussing the growth of government regulation and the subversion of regulation by private parties).

14. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 11 (1842) ("[N]or have the Courts power to create or adopt laws—they must administer the law as existing."); see also *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (Story, Circuit Justice, C.C.D. Mass. 1822) (No. 15,551) (holding that the slave trade violates the law of nations and the law of nature because "[i]t is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice").

15. This ranges from ordinary criminal statutes to regulatory regimes as complicated and important as the Affordable Care Act.

16. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*59.

context, the subject matter, the effects and consequence, or the spirit and reason of the law.<sup>17</sup>

In many ways, Blackstone described the “natural law” theory of interpretation that dominated Anglo-American legal thinking for much of the seventeenth, eighteenth, and nineteenth centuries.<sup>18</sup> Natural law proponents believed that the inherent limitations of language made text alone an incomplete source of information.<sup>19</sup> Many great early American thinkers referenced the “reason and spirit” of the law they were interpreting as guiding (and limiting) tools.<sup>20</sup> This method of interpretation vests a heavy amount of discretion in the judge. A natural law approach allows a judge to deviate from the intent of the legislature if it does not produce a “just” result.<sup>21</sup>

In the latter half of the nineteenth century, the natural law approach gave way to the formalistic “Old Textualism.”<sup>22</sup> Old Textualism was an ancestor of New Textualism that took a literal view of statutes and text. Old Textualists followed a positivist approach to law, meaning that judges acted as pseudolegal scientists who “discovered” rather than created law.<sup>23</sup> At their core, Old Textualists focused on the text of a statute as the clearest expression of the intent of the legislature. To determine this legislative intent, Old Textualists believed judges should utilize deductive reasoning to solve any ambiguity.<sup>24</sup> But the rigidity of this early formalism led to resistance by jurists such as Justice Oliver Wendell Holmes in the early twentieth century.<sup>25</sup>

Justice Holmes believed that the competing policy interests could not be decided neutrally using deductive reasoning or mathematical formulas.<sup>26</sup> Proponents of the Holmesian approach adopted the “faithful agents” model

17. *Id.*; see also Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229, 232 (2004).

18. R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37, 41–48 (1997).

19. *See id.* at 42.

20. *See id.* at 42–43. For example, Justice Story believed that “the reason and spirit of the law, or the causes, which led to its enactment, are often the best exponents of the words, and limit their application.” *Id.* at 43 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §400 (Boston, Hilliard, Gray & Co. 1833)).

21. *Id.* at 45.

22. There are technically three versions of formalism: “the Literal Rule, the Golden Rule, and the Plain Meaning Rule.” *Id.* at 49. The Literal Rule requires a court to follow a literal meaning, even if it’s absurd. *Id.* The Golden Rule allows courts to depart from the literal meaning if it creates ambiguity or produces absurd results. *Id.* at 50. The Plain Meaning Rule is not as defined but generally allows for purpose to be considered if it’s on the face of the statute. *Id.* Yet all three preclude the use of legislative history. *Id.* at 48–53. For simplicity, these will collectively be referred to as “Old Textualism.” New Textualism is a modern version of the Golden Rule version of formalism.

23. *Id.* at 48.

24. William N. Eskridge, Jr. & Philip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at lvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

25. *Id.* at lv–lvi.

26. *Id.*

of interpretation, which attempts to effectuate the purpose and intent of the legislature.<sup>27</sup> Instead of mechanically looking at the text, the users of the Holmesian method allowed (and frequently used) legislative history.<sup>28</sup> But as legal realism continued to take root in American jurisprudence, a different approach took root in statutory interpretation. The New Deal Era, World War II, and increased focus on public law led to the rise of the purposivists.<sup>29</sup>

Perhaps best demonstrated by Professors Henry Hart and Albert Sacks, purposivists desire to interpret a statute in a way that advances the overall social goal of the original legislation.<sup>30</sup> At bottom, Hart and Sacks purposivists desired a system of flexible standards when presented with an ambiguous statute.<sup>31</sup> A judge should reason how a given interpretation will impact (either advance or inhibit) social policy.<sup>32</sup> While this approach dominated the 1950s and 1960s,<sup>33</sup> a backlash at perceived judicial activism<sup>34</sup> led to the creation of a new approach to statutory interpretation.<sup>35</sup>

New Textualism has risen to dominance over the past few decades as a consequence of the backlash against judicial activism.<sup>36</sup> Led most prominently by Justice Scalia, the approach advanced a formalist-style mindset that focuses on text at the expense of resorting to a broader purpose or looking to legislative history.<sup>37</sup> This is not meant to imply that New Textualists are hyperliteralists. Many go to great lengths to reject that label.<sup>38</sup> Rather,

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27. See Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1889–900 (2008).

28. Kelso, *supra* note 18, at 55.

29. Eskridge & Frickey, *supra* note 24, at lxviii–xci; Kelso, *supra* note 18, at 57.

30. Kelso, *supra* note 18, at 57.

31. Eskridge & Frickey, *supra* note 24, at xciii (discussing the idea that unless the legislature provides specific rules, judges should fill in the gaps).

32. See Kelso, *supra* note 18, at 57–58. An excellent example of this method of interpretation is *United Steelworkers of America v. Weber*. There, Justice Brennan overrode clear text and some legislative history (while utilizing other evidence from the legislative history) to interpret Title VII in a way that was most consistent (allowing affirmative action plans) with its statutory purpose of fighting discrimination. 443 U.S. 193 (1979).

33. Kelso, *supra* note 18, at 37–38.

34. This Comment focuses on statutory construction, not constitutional interpretation or construction. *Lochner v. New York*, 198 U.S. 45 (1905), while associated with judicial activism, is normally associated with constitutional law. Techniques of statutory interpretation are not typically associated with constitutional law. Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 40–46 (2004).

35. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 622–24 (1990).

36. See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 347–48 (2005).

37. Kelso, *supra*, note 18, at 39.

38. See, e.g., SCALIA & GARNER, *supra* note 1, at 16, 20; Nelson, *supra* note 36, at 347–48. Justice Scalia explicitly rejected the label of literalist, stating that his version of textualism considered context, assuming it worked within the framework of the statute. SCALIA & GARNER, *supra* note 1, at 20.

New Textualists attempt to discern legislative intent through the lens of an “objective reader” and a focus on the text and any relevant context.<sup>39</sup>

New Textualism, on its face, is an appealing method of interpretation. It looks for meaning in the source of the controversy—the text.<sup>40</sup> The approach provides a set of entertaining interpretive tools that allows the user to glean meaning from seemingly ambiguous text.<sup>41</sup> And, unlike Old Textualism, New Textualism recognizes the importance of context when interpreting a statute—but within carefully proscribed limitations that inhibit judicial activism.<sup>42</sup> It seems to strike a happy medium between the formalistic Old Textualism and the more “unrestrained” approaches to statutory interpretation.<sup>43</sup> At bottom, the approach reasonably seeks to “[a]dher[e] to the *fair meaning* of the text.”<sup>44</sup>

New Textualism also appears to impose discipline on the judiciary.<sup>45</sup> While legislative history and purpose are “spongy”<sup>46</sup> concepts, a focus on the text restrains judges from injecting their own values into the interpretation of the statute, or so the argument goes.<sup>47</sup> Justice Scalia believed that “the more the interpretive process strays outside a law’s text, the greater the interpreter’s discretion. Extra materials are bound to look in multiple directions.”<sup>48</sup> A judge operating within the text is much less prone to “judicial adventurism.”<sup>49</sup> Using sources outside of the text was akin to “entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”<sup>50</sup> Finally, on a fundamental and intuitive level, New Textualism just seems to make sense—especially to new law students. These qualities allowed it to occupy an increasingly dominant place among the judiciary, to

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39. See generally SCALIA & GARNER, *supra* note 1.

40. See generally *id.*

41. See generally *id.* Similarly, Professor Eskridge explained that “[t]extual canons posit that Congress follows certain rules of grammar, language use, and punctuation when it writes statutes.” Eskridge, *supra* note 35, at 664 .

42. Justice Scalia lists four limitations on the use of purpose and context when interpreting a statute: (1) “the purpose must be derived from the text”; (2) “the purpose must be defined precisely”; (3) “the purpose is to be described as concretely as possible, not abstractly”; and (4) “except in the rare cases of an obvious scrivener’s error, purpose . . . cannot be used to contradict text or to supplement it.” SCALIA & GARNER, *supra* note 1, at 56–57.

43. See Eskridge, *supra* note 35, at 655–56; see also SCALIA & GARNER, *supra* note 1.

44. SCALIA & GARNER, *supra* note 1, at 356.

45. Eskridge, *supra* note 35, at 654.

46. See *id.* at 653.

47. *Id.* at 654.

48. Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 1, at xxii.

49. *Rasul v. Bush*, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting).

50. SCALIA & GARNER, *supra* note 1, at 377.



the point where Justice Elena Kagan stated, “we’re all textualists now.”<sup>51</sup> But the meteoric rise of New Textualism has a dark side.<sup>52</sup>

## II. THE RHETORICAL CANONS OF CONSTRUCTION AND NEW TEXTUALISM

This Part proposes a framework to analyze the rhetoric behind New Textualism. The framework seeks to identify damaging characteristics of New Textualist rhetoric through a series of three core “rhetorical canons of construction.”<sup>53</sup> Through these core canons, the framework identifies some of the underhanded, specious, and unfair rhetorical tactics utilized by New Textualists and demonstrates how their rhetoric contributed heavily to their rise to power. Each “rhetorical canon” is described and then applied to examples of prominent New Textualist opinions and writings. To be clear, the “rhetorical canons of construction” created by this Comment are different from the set of semantic and substantive canons designed to interpret statutes and legal texts. Section II.A describes and applies the “hypocrisy canon.” Next, Section II.B describes and applies the “ad hominem canon.” Finally, Section II.C describes and applies “cocktail party canon.”

### A. The “Hypocrisy Canon”

New Textualists often advance specious arguments while calling others illegitimate. In other words, New Textualists attack a purposivist or intentionalist for a deficiency while advancing an argument about their own approach that suffers from the same, or a similar, deficiency—making them hypocritical. This is the hypocrisy canon. When New Textualists deploy the hypocrisy canon, they refuse to engage with purposivists and intentionalists, making productive debate difficult, if not impossible. To enter the conversation, purposivists and intentionalists must show ambiguity within the text before turning to other sources of information.<sup>54</sup> New Textualists are playing on their home field.

This is distinguishable from the regular legal debate surrounding statutory interpretation. Instead of arguing that the other side is wrong, New

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51. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (quoting Justice Elena Kagan, Lecture at Harvard Law School Antonin Scalia Lecture (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [https://perma.cc/9BN6-PMJW] (“I think we’re all textualists now in a way that just . . . was not remotely true when Justice Scalia joined the bench.”)).

52. Not THE Dark Side of the Force but a dark side. See STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK (Lucasfilm Ltd. 1980) (“[B]eware of the dark side. Anger . . . fear . . . aggression. The dark side of the Force are they. Easily they flow, quick to join you in a fight. If once you start down the dark path, forever will it dominate your destiny, consume you it will . . .”).

53. This is, admittedly, a bit of tongue in cheek allusion to the “canons of construction” often deployed by New Textualists.

54. See, e.g., *Yates v. United States*, 135 S. Ct. 1074 (2015) (plurality opinion); see also Justice Elena Kagan, *supra* note 51 (“[W]e’re all textualists now.”).

Textualists deploy the hypocrisy canon to insist purposivist or intentionalist readings are *illegitimate*: the competing approach is so flawed and unprincipled that it is anathema to statutory interpretation as a whole and should be discarded. Much like Justice Scalia's former disruptive style on the bench,<sup>55</sup> New Textualists use these loud and underhanded rhetorical tactics to drown out the opposition.

For example, I can disagree with New Textualism's methods for a variety of reasons. But I would not argue that it is an illegitimate approach to statutory interpretation. New Textualism does bring some good ideas to the table.<sup>56</sup> Rather, it's the rhetorical *absolutism* brought by many, but not all, New Textualists that is so troubling.<sup>57</sup> Saying an opposing viewpoint is illegitimate implies it has nothing to offer and is a nonsensical point of view. This Comment now turns to examples of New Textualists deploying the hypocrisy canon.

### 1. *Reading Law* and the Canons of Construction

The first example is the seminal book *Reading Law*, by Justice Antonin Scalia and linguist Bryan Garner.<sup>58</sup> The book is a leading treatise on New Textualism and statutory interpretation.<sup>59</sup> But the book is premised on the use of the hypocrisy canon. Scalia and Garner advance their misleading argument that sticking to the text will constrain judges and provide uniformity,<sup>60</sup> while deeming purposivism and other approaches illegitimate throughout the treatise.<sup>61</sup>

The core argument is hollow for multiple reasons. Scalia and Garner's goal is to codify the New Textualist interpretive techniques and provide a workable and constraining set of principles. This sounds helpful in theory. The book, however, fails to provide any applicable framework for a New

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55. See Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1433 (2017) (noting that Justice Scalia interrupted Justice Breyer "at such an extraordinary rate as to dwarf all other interruptions" by other justices).

56. See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 116–18 (describing how a New Purposivist approach to statutory interpretation could incorporate textualist elements to create a better doctrine).

57. To be fair, John F. Manning (a prominent textualist) has attempted to bridge the gap between the two doctrines. See *id.*; see also John F. Manning, Essay in Honor of Justice Ginsburg, *Justice Ginsburg and the New Legal Process*, 127 HARV. L. REV. 455, 458 (2013) ("Justice Ginsburg relied heavily on statutory purpose. But in contrast with the Old Legal Process approach that once prevailed, her approach did not treat purpose as a freestanding concept.").

58. SCALIA & GARNER, *supra* note 1.

59. The book is now a regular reference on the Court according to Justice Kagan. Justice Elena Kagan, *supra* note 51. According to Professor Mendelson's research, the book has "been cited 15 times in the Supreme Court, 103 times in opinions of the lower federal courts, and 108 times in state courts." Mendelson, *supra* note 11 (manuscript at 5 n.15).

60. See SCALIA & GARNER, *supra* note 1, at 16–18.

61. *Id.* at 15–28, 343–410.

Textualist interpretation. The treatise is over 500 pages<sup>62</sup> and describes 57 different canons of construction,<sup>63</sup> but it is devoid of any guidance on how to use them.<sup>64</sup> Nothing in the book tells a user when to use canons, how many canons to use, or whether a hierarchy exists. The only overarching principle is “[n]o canon of interpretation is absolute.”<sup>65</sup> The inherent ambiguity of language, coupled with the lack of a coherent interpretive regime supplied by New Textualists, is ripe for chaos.

These abstract concerns about the canons play out in practice as well. Empirical research on the usage of canons at the Supreme Court demonstrates that the lack of a cohesive hierarchy or framework to guide canon usage creates inconsistent results.<sup>66</sup> Unlike states that have codified methods of statutory interpretation,<sup>67</sup> New Textualists have not, and perhaps cannot, create a proper hierarchy. Due to the large number of interpretive canons and the different (and, at times, conflicting) results that each canon can produce, the fight now is *which* canons are proper for a given case.<sup>68</sup> Confounding the issue, the Court appears to be creating and eliminating canons as time goes by.<sup>69</sup>

*Yates v. United States* is an excellent example of what a case involving statutory interpretation looks like when a court uses the approach advocated by Scalia and Garner.<sup>70</sup> In *Yates*, the Court needed to determine whether a fish counted as a “tangible object” under the Sarbanes-Oxley Act.<sup>71</sup> Both the plurality (authored by Justice Ginsburg) and dissenting (authored by Justice Kagan) opinions invoked a host of canons in support of their positions.

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62. See generally SCALIA & GARNER, *supra* note 1.

63. *Id.* at 51.

64. The authors fail to provide a coherent framework for prioritizing and applying the canons. See generally SCALIA & GARNER, *supra* note 1.

65. *Id.* at 59. This “fundamental principle” appears to be included as a response to Karl Llewellyn’s article from 1950, in which he demonstrated for each canon of statutory construction, there is a equal and conflicting canon. Karl N. Llewellyn, Symposium, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950). In this section, the two authors declare that although the canons “can be abused . . . we should hardly abandon them.” SCALIA & GARNER, *supra* note 1, at 61. One wonders why legislative history does not deserve the same treatment.

66. Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 849 (2017) (finding inconsistency in the deployment of interpretive canons across justices on the Roberts Court). And this is not due to inexperienced use by nontextualists. Rather, justices of all ideologies “cherry-pick” canons as needed. See Eskridge, *supra* note 6, at 534; see also Mendelson, *supra* note 11 (manuscript at 6–7). It is likely that the number of semantic canons reduces the need for substantive canons, such as the absurdity canon, since there is more room to operate within the scope of the text. Cf. Krishnakumar, *supra* at 847–49 (finding that substantive canons are not frequently invoked by the Roberts Court).

67. Gluck, *supra* note 12, at 1754.

68. See, e.g., *Yates v. United States*, 135 S. Ct. 1074 (2015) (plurality opinion); see also Mendelson, *supra* note 11, (manuscript at 25–48).

69. Mendelson, *supra* note 11 (manuscript at 36–37).

70. *Yates*, 135 S. Ct. at 1074.

71. *Id.* at 1078–79.

Justice Ginsburg deployed the *noscitur a sociis*<sup>72</sup> and *ejusdem generis*<sup>73</sup> canons in addition to relying on the statute's purpose, dictionaries, and the rule of lenity.<sup>74</sup> Justice Kagan, by contrast, deployed the whole code and whole act canons.<sup>75</sup> Neither side gives an inch in the interpretive war and neither provides substantial justification regarding their *choice* of canons. There is still a "prevailing confusion"<sup>76</sup>—the "war never changes,"<sup>77</sup> only the weapons of interpretation do.

This inconsistency reveals how New Textualism and Justice Scalia's canons allow judges significant freedom to interpret a statute.<sup>78</sup> This reduces predictability in statutory interpretation and increases the possibility of judicial activism.<sup>79</sup> Far from providing uniformity and stability, the data suggests Scalia's canons do little to end the "prevailing confusion." They may even add to it.

Even among the canons that are used consistently, there are problems. The most widely deployed canon at the Supreme Court level, *expressio unius*,<sup>80</sup> is used in no more than 17.6% of statutory interpretation cases.<sup>81</sup> Disturbingly, empirical research suggests that congressional staffers *reject* three of the top five<sup>82</sup> most commonly discussed canons by the Supreme Court.<sup>83</sup> That is, drafters of legislation either do not follow the canon's rule (because they are unaware of it) or draft in a manner that is *opposite to* the canon's rule (because they're appealing to other stakeholders).

In addition to advocating for the use of their canons, Scalia and Garner devote a substantial portion of the book to delegitimizing other methods and sources of interpretation. The two authors describe the other methods of interpretation as ones which widely neglect text, which has "impaired the

72. A word is known by the company it keeps. See SCALIA & GARNER, *supra* note 1, at 434–35.

73. General words following a list of specific words should usually be read in light of those specific words. See *id.* at 428.

74. *Yates*, 135 S. Ct. at 1081–89.

75. *Id.* at 1090–1101 (Kagan, J., dissenting).

76. Assuming there ever was a prevailing confusion.

77. Cf. *FALLOUT 3* (Bethesda Softworks 2008) ("War. War never changes.").

78. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 *Geo. L.J.* 1083, 1153–56 (2008) (finding that despite the use of canons, the "data strongly suggest that ideology plays a powerful and pervasive role in shaping Supreme Court decisions with regard to agency statutory interpretations" even among staunch textualists).

79. See Gluck, *supra* note 12, at 183–87.

80. The inclusion of a term is to the exclusion of another term. In other words, specifically including a term means that all other specific terms are excluded. SCALIA & GARNER, *supra* note 1, app. B at 428.

81. Mendelson, *supra* note 11 (manuscript at 26) (finding that *expressio unius* is discussed, not necessarily applied, in only 18.5% of statutory interpretation cases).

82. *Expressio unius*, 18.5%; Whole Act Rule, 15.3%; Rule Against Surplusage, 13.3%. *Id.*

83. See *id.* (manuscript at 4) (citing Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *STAN. L. REV.* 901 (2013)).

predictability of legal dispositions, . . . weakened our democratic processes,” and “distorted our system of governmental checks and balances.”<sup>84</sup> Scalia and Garner describe the use of the “spirit” of a statute (as opposed to the letter) as a “bald assertion of an unspecified and hence unbounded judicial power to ignore what the law says, leading to ‘completely unforeseeable and unreasonable results.’”<sup>85</sup> This blustery rhetoric shows usage of the hypocrisy canon. Scalia and Garner are not merely advocating that their method of interpretation is right and others are wrong. Rather, they’re attempting to *delegitimize* all other methods as unprincipled. The two authors use rhetoric when substance fails.

## 2. The Rule Against Surplusage

*Reading Law* is full of specific examples of the hypocrisy canon. Perhaps the most egregious is Scalia and Garner’s faith in the surplusage canon and their treatment of legislative history. The authors advance a hollow argument about the rule against surplusage while demonizing legislative history (and any method of interpretation that uses it) as illegitimate.

The rule against surplusage is: “if possible, every word and every provision is to be given effect.”<sup>86</sup> In other words, courts should strain to provide each word in a statute with an independent meaning, even if multiple words or provisions appear identical on their face. The canon is one of the most widely used semantic canons of construction<sup>87</sup> and has widespread acceptance (especially at the Supreme Court level).<sup>88</sup> But this argument is concerning due to the fact that legislative drafters often follow an opposite rule.<sup>89</sup> Legislative drafters *purposely* add in surplus terms in a belt and suspenders approach to ensure that their intended meaning gets across.<sup>90</sup> Legislative drafters stated that they “intentionally err on the side of redundancy to ‘capture the universe’ or ‘because you just want to be sure you hit it.’”<sup>91</sup> On top of that, “politically for compromise they must include certain words in the statute—that senator, that constituent, that lobbyist wants to see that word[,] . . . and they might overlap.”<sup>92</sup> Scalia and Garner seem aware of this fact,<sup>93</sup> but their response is that “[s]tatutes *should* be carefully drafted” and

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84. SCALIA & GARNER, *supra* note 1, at xxvii.

85. *Id.* at 343 (quoting Frederick J. de Sloovere, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. REV. 538, 542 (1934)).

86. *Id.* app. B at 440.

87. Mendelson, *supra* note 11 (manuscript at 26).

88. *Id.* (manuscript at 28).

89. Eskridge, *supra* note 6, at 573.

90. See Gluck & Bressman, *supra* note 83, at 934–36 (“[E]ven in short statutes—indeed, even within single sections of statutes . . . terms are often *purposefully redundant to satisfy audiences other than courts.*”).

91. *Id.* at 934.

92. *Id.*

93. SCALIA & GARNER, *supra* note 1, at 179.

that legislators “ought to hire eagle-eyed editors” to avoid this problem.<sup>94</sup> This is a nonresponse in the face of adverse empirical evidence.

While trumpeting a fallacious argument about the rule against surplusage, the authors also attack the use of legislative history. The authors describe the use of legislative history as a “crapshoot.”<sup>95</sup> They claim it is “not just wrong; it violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation.”<sup>96</sup> *Reading Law* claims—without evidence—that legislative history exists today because courts refer to it, not the other way around.<sup>97</sup> In other words, legislators only engage in floor debates in an attempt to “induce courts to accept their views about how the statute works.”<sup>98</sup> All of this rhetoric is designed to make *any* use of legislative history illegitimate, and in the view of New Textualists, it taints any mode of interpretation that deploys it. As before, this is not a normal disagreement with other methods. It’s an assault on the very *legitimacy* of these other methods. This is an unmerited rhetorical assault on the use of legislative history.<sup>99</sup>

### 3. Dictionaries

Dictionaries also play a role in the New Textualist hypocrisy canon. As the Court turns away from other sources of information in recent decades, dictionaries are increasingly important.<sup>100</sup> They often play a key role in New Textualist interpretation, since they lend credence to the “plain meaning” so desired. To obtain the “plain meaning” of a given word or statute, New Textualists (and increasingly the Supreme Court as a whole) often turn to dictionaries as an external—but neutral and constrained—source of information.<sup>101</sup> Dictionaries possess an “aura of authority” that New Textualists are eager to latch onto.<sup>102</sup>

But the basic premise here is faulty. Dictionaries do not provide a universal plain meaning.<sup>103</sup> Rather, dictionaries provide descriptions of words deprived of context. Different dictionaries provide different and conflicting definitions. For example, in *MCI Telecommunications Corp.*,<sup>104</sup> the issue was

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94. *Id.* (second emphasis added).

95. *Id.* at 389.

96. *Id.* at 388.

97. *Id.* at 377.

98. *Id.* Remarkably, the two authors provide little support for this assertion.

99. See *infra* note 152–153 and accompanying text.

100. See James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 486–90 (2013).

101. *Id.* at 490, 494.

102. See Phillip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 176 (2010).

103. See Brudney & Baum, *supra* note 100, at 490.

104. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994).

whether “modify” meant to change moderately or fundamentally.<sup>105</sup> The majority found “widespread” agreement among dictionaries that “modify” meant to “change moderately or in minor fashion.”<sup>106</sup> But the petitioners found the conflicting definition of “to make a basic or important change” in *Webster’s Third* and other Webster’s dictionaries—a conflict that indicated ambiguity.<sup>107</sup> Consulting dictionaries provided no semantic silver bullet to settle the debate. Consequently, even among words that appear relatively settled, the use of dictionaries typically only adds to the uncertainty.<sup>108</sup> The “meaning” given to words is static and dependent on the arcane world of dictionary compilation.<sup>109</sup>

Judges also routinely use dictionaries without a proper understanding of how they are compiled and their inherent limitations.<sup>110</sup> For example, judges often refer to the order in which definitions are supplied for a given word, believing that the definitions are presented in order from the most to the least common usage.<sup>111</sup> But dictionaries are *not* always compiled in this way. The order of definitions can reflect a host of differing meanings, ranging from historical order to structural coherence.<sup>112</sup> Most concerning, the dictionaries most often cited by the Supreme Court do *not* use word frequency when compiling definitions.<sup>113</sup> Judges glean intricate information about “plain meaning” from sources they do not understand.

Judges also routinely fall into the trap of relying on a single dictionary as their source of plain meaning. Justice Scalia was particularly fond of *Webster’s Second New International Dictionary*<sup>114</sup> but disliked *Webster’s Third New International*, since it was “notoriously permissive.”<sup>115</sup> By only using one dictionary, judges rely on a closed universe of information. Similar issues arise when judges do not use dictionaries consistently but instead search for definitions that support their arguments.<sup>116</sup> The fear of judicial cherry-picking is omnipresent when judges have a variety of different (and often conflicting) sources of “authority.”<sup>117</sup>

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105. Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 325–26 (1998).

106. *Id.* (quoting *MCI Telecomms.*, 512 U.S. at 225).

107. *Id.* (quoting *MCI Telecomms.*, 512 U.S. at 225–26, 226 n.2).

108. *See id.*

109. *See generally* Brudney & Baum, *supra* note 100 (examining the Court’s increased reliance upon dictionary definitions, reflecting a casual form of opportunistic conduct).

110. *Id.* at 490.

111. *Id.* at 514–15.

112. *Id.* at 513–14.

113. *Id.* at 514.

114. *Id.* at 489.

115. *Id.* at 509 (quoting SCALIA & GARNER, *supra* note 1, app. A at 418).

116. *Id.* at 566–67.

117. *See* Aprill, *supra* note 105, at 313.

For example, in *Muscarello v. United States*,<sup>118</sup> the dissent and majority argued over the correct use of the word “carries” in relation to a concealed weapons statute.<sup>119</sup> Justice Breyer, for the majority, consulted seven different dictionaries,<sup>120</sup> the King James Bible,<sup>121</sup> *Moby Dick*,<sup>122</sup> and the *Arkansas Gazette*<sup>123</sup> to bolster the conclusion that “carries” included a gun in a locked glove compartment. Most notably for our purposes, Justice Breyer pointed out and drew meaning from the fact that the majority’s definition of “carries” was the first given meaning in the Oxford English Dictionary, while the dissent’s definition was the twenty-sixth given meaning.<sup>124</sup> After this exhaustive list, the majority then turned to legislative history and statutory purpose to finalize their conclusion that the phrase “carries a firearm” included a gun in a locked glove compartment.<sup>125</sup>

The dissent, by Justice Ginsburg, responded to this barrage of information by stating, “[u]nlike the Court, I do not think dictionaries, surveys of press reports, or the Bible tell us, dispositively, what ‘carries’ means embedded in § 924(c)(1).”<sup>126</sup> To prove this point, Justice Ginsburg proceeded to list her own conflicting historical and literary sources before concluding, “[t]hese and the Court’s lexicological sources demonstrate vividly that ‘carry’ is a word commonly used to convey various messages.”<sup>127</sup> Interestingly, Justice Scalia joined Justice Ginsburg’s dissent despite on numerous other occasions citing dictionaries favorably, or in a blocking manner.<sup>128</sup>

This inconsistency became something of a pattern for Justice Scalia, who, depending on the situation, either excoriated the opposition for relying too heavily on dictionary definitions<sup>129</sup> or himself placed outside importance

118. 524 U.S. 125 (1998).

119. *Muscarello*, 524 U.S. at 126–27. Specifically, the issue was whether a gun in a locked glove compartment was “carried” in a drug transaction, which would impose mandatory minimums under 18 U.S.C. § 924(c)(1) (2012).

120. The dictionaries are the *Oxford English Dictionary*, *Webster’s Third International Dictionary*, *Random House Dictionary*, the *Barnhart Dictionary of Etymology*, the *Oxford Dictionary of English Etymology*, *Black’s Law Dictionary*, and *Webster’s Dictionary of Synonyms*. *Id.* at 128, 130, 135.

121. *Id.* at 129.

122. *Id.*

123. *Id.* at 130.

124. *Id.* at 128, 130. As stated above, the order in which words are listed is not a ranking of usage. See Brudney & Baum, *supra* note 100, at 513–14.

125. *Muscarello*, 524 U.S. at 132–35.

126. *Id.* at 142–43 (Ginsburg, J., dissenting) (footnotes omitted).

127. *Id.* at 143–44.

128. See Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 (1994) (“Justice Scalia has been the most willing to employ dictionaries”); see, e.g., *Chisom v. Roemer*, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting) (finding, based on a single dictionary definition, that there is “little doubt that the ordinary meaning of ‘representatives’ does not include judges, see Webster’s Second New International Dictionary 2114 (1950)”).

129. See Aprill, *supra* note 105, at 318–21.



on dictionary definitions.<sup>130</sup> In the words of one scholar, “where the dictionary definitions can be read to narrow the governmental power, Justice Scalia treats the dictionary definition as if it revealed the one ordinary meaning . . . [but] Justice Scalia rejects dictionary definitions in other opinions, at least when they . . . broaden[ ] the power of government.”<sup>131</sup>

This all fits the hypocrisy canon, since New Textualists often use dictionaries to argue that their meanings are the most “fair” or “plain.”<sup>132</sup> They claim their method of interpretation is more constraining on judges due to these inherent limitations provided by text and sources such as dictionaries.<sup>133</sup> But while they rail against the use of legislative history and purpose as unhinged and illegitimate,<sup>134</sup> the use of dictionaries allows for the same judicial cherry-picking of preferred information that New Textualists claim to abhor.<sup>135</sup> Much like the canons of construction described in *Reading Law*,<sup>136</sup> the lack of a cohesive framework and judicial discipline robs dictionaries of their usefulness and any constraining effect they may possess.

#### 4. “Harm” and the Endangered Species Act Case

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>137</sup> a group of homeowners in Oregon sued the Department of the Interior based on the Department’s broad interpretation of the word “harm” from

130. See *id.* at 325–27, 329–30.

131. *Id.* at 318; see also Note, *supra* note 128, at 1447–48 (“Justice Scalia, for example, has referred to the 1950 edition of *Webster’s Second* in four cases during the past three years, to other editions of *Webster’s Second* in two cases, and to *Webster’s Third* in two cases, with no evident relationship between the age of the dictionary and that of the statute under consideration.”) (footnotes omitted). But see *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting) (“It is, however, a ‘fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.’”) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)); SCALIA & GARNER, *supra* note 1, at 417–18 (“[A] comparative weighing of dictionaries is often necessary.”).

132. See, e.g., *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566–69 (2012) (where Justice Alito consults numerous dictionaries to confirm his interpretation that the word “interpreter” does not include document translation services); *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting); see also A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71, 72 (1994); Rubin *supra* note 102, at 168 (“Dictionary usage is particularly important in textualist analysis, which seeks to find ‘a sort of “objectified” intent . . .’ and places foremost priority on the text itself, as opposed to utilizing external sources of understanding.”) (footnotes omitted) (quoting ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (1997)); Note, *supra* note 128, at 1440 (“The Court’s growing faith in dictionaries is tied to a broader methodological shift toward textualism in statutory interpretation.”).

133. See Brudney & Baum, *supra* note 100, at 577.

134. See, e.g., SCALIA & GARNER, *supra* note 1, at 343, 369–90 (“Legislative history creates mischief both coming and going.”).

135. See Brudney & Baum, *supra* note 100, at 491.

136. See *supra* Section II.A.1.

137. 515 U.S. 687 (1995).

the Endangered Species Act.<sup>138</sup> The majority agreed with the Department and held that the word “harm” can include “significant habitat modification and degradation that actually kills or injures wildlife” and “indirect takings.”<sup>139</sup>

Justice Scalia wrote a blistering dissent. He argued that the Department and majority’s interpretation “makes nonsense of the word that ‘harm’ defines”<sup>140</sup> and “defined [the] term in a manner repugnant to its ordinary and traditional sense.”<sup>141</sup> This stinging rhetoric, and the justice’s reasoning in his dissent, is an example of the hypocrisy canon. He advanced a questionable argument before attacking the majority’s use of legislative history as illegitimate.

When confronted with conflicting information, Scalia dug in.<sup>142</sup> He attempted to poke holes in the majority’s reasoning through a variety of textual arguments. As for the conflicting information, the Justice responded, “[t]here is little fear . . . that giving no effect to the relevant portions of the Committee Reports will frustrate the real-life expectations of . . . Congress. If they read and relied on such tedious detail on such an obscure point . . . the Republic would be in grave peril.”<sup>143</sup> Like with the canon against surplusage above, this is a nonresponse in the face of adverse reasoning. Justice Scalia simultaneously advocated for Congress to hire “eagle-eyed editors”<sup>144</sup> to ensure legislative precision and downplayed the importance of details in statutory interpretation.<sup>145</sup> The justice could not have it both ways, despite his loud rhetoric.

After advancing this inconsistent argument, the late justice then continued to attack the majority’s use of legislative history as an illegitimate exercise. He stated that the legislative history did not support the majority’s position “[e]ven *if* legislative history were a legitimate and reliable tool of interpretation . . . and even *if* it could appropriately be resorted to when the enacted text is as clear as this . . .”<sup>146</sup> The justice here did not merely disagree with the reasoning of the majority and the Department. Rather, Scalia found their opinion and their methods altogether illegitimate.

These examples demonstrate that New Textualists, inspired by Justice Scalia, frequently utilize the hypocrisy canon in their rhetoric.

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138. *Id.* at 692.

139. *Id.* at 708.

140. *Id.* at 719 (Scalia, J., dissenting).

141. *Id.*

142. *Id.* at 714 (or as the Justice states, “the simplest farmer who finds his land conscripted to national zoological use”).

143. *Id.* at 730–31.

144. SCALIA & GARNER, *supra* note 1, at 179.

145. *Babbitt*, 515 U.S. at 730–31.

146. *Id.* at 726 (emphases added).

B. The “Ad Hominem Canon”<sup>147</sup>

New Textualists often refuse to answer opposing arguments on their merits.<sup>148</sup> Rather, New Textualists routinely attack the *source* of information, instead of its *substance*.<sup>149</sup> This is the “ad hominem canon.”<sup>150</sup> The ad hominem canon is deployed when a New Textualist refuses to engage with *any* of the underlying substance of an opposing method of interpretation and instead dismisses the argument as illegitimate.<sup>151</sup> The central problem with this argument is that legislative history<sup>152</sup> and statutory purpose<sup>153</sup> *are* legitimate. And unlike Justice Scalia’s canons, a workable hierarchy and system of interpretation *has* been proposed for the use of legislative history.<sup>154</sup> As Section II.A demonstrated, many of the same issues with purposivism and intentionalism also plague New Textualism.

This rhetorical canon is designed to distract from the deficiencies of the New Textualist approach. It’s a rhetorical cheap shot. Instead of refuting the arguments presented by the opposing method of interpretation, usage of this canon shows the weaknesses undergirding New Textualism. Similar to the

147. There may be some overlap between rhetorical canons of construction, since they are not meant to be hermetically sealed from one another. Parts of one canon may influence others, and all share some commonality. For example, a phrase uttered by a proponent of a method of interpretation could fit both the hypocrisy and ad hominem canons.

148. See, e.g., *infra* Sections II.B.1, II.B.2, II.B.3.

149. See *infra* Sections II.B.1, II.B.2, II.B.3.

150. This canon is much akin to the “ad hominem” attack, where a proponent attacks the personal traits of an opponent instead of the merits of their argument. The ad hominem *canon*, however, occurs when the user refuses to consider the merits of an argument because the argument is derived from disagreeable sources.

151. See, e.g., *infra* Section II.B.1, II.B.2, II.B.3.

152. See James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 117 (2008) (noting that after “analyzing all 320-plus majority opinions in workplace law authored by eight liberal Justices from 1969-2006, the authors establish that legislative history reliance is actually associated with a constraining set of results”); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72 (2012) (“Legislative history’s fires still burn.”); see also *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (“I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption . . .”).

153. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 97 (2006) (“[I]n our constitutional system, courts have responsibility for seeing that a statute’s apparent purposes are fulfilled.” (citing Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 394–95 (1942))). Professor John F. Manning argues for the New Purposivist approach to statutory interpretation, which includes some textualist principles to limit the outer bound of construction (and avoid a *Holy Trinity* situation). See Manning, *supra* note 56, at 118 (“But if one accepts that Congress legislates at many different levels of generality and that the resulting differences reflect evident choices about how much discretion to leave to judges and administrators, then fidelity to legislative purpose in a system of legislative supremacy requires interpreters to respect Congress’s choice of means.”).

154. Nourse, *supra* note 152, at 90–128 (detailing “simple principles” for the use of legislative history).

hypocrisy canon, when New Textualists deploy the ad hominem canon, they're attempting to end the interpretive debate when it becomes difficult. Akin to someone ignoring a phone call because they fear bad news, this technique allows New Textualists to ignore information that may weaken their argument. This Comment next considers examples of New Textualists deploying the ad hominem canon.

### 1. The Frozen Trucker Case

In *TransAm Trucking, Inc. v. Administrative Review Board*,<sup>155</sup> a trucker forced to the side of the road during a snowstorm faced a crucial choice: abandon his trailer or stay in the cab and wait for help.<sup>156</sup> The trucker, fearing hypothermia, left the trailer and was later fired.<sup>157</sup> He subsequently brought a whistleblower action against TransAm Trucking. In the Tenth Circuit, the case hinged on the meaning of the term “operate” within the Surface Transportation Assistance Act (STAA).<sup>158</sup> TransAm argued that because the trucker did “operate” his truck to drive away when he was instructed to wait for help, he did not fall within the “refusal to operate” whistleblower provisions of the STAA.<sup>159</sup> The majority found for the trucker: it held that the term “operate” was not defined in the statute, and it deferred to the Department of Labor’s interpretation under *Chevron* deference.<sup>160</sup>

Then-Judge Neil Gorsuch’s dissent, deploying the ad hominem canon, disagreed and found the statute to be unambiguous and favoring the employer.<sup>161</sup> Based on this supposed plain meaning, Gorsuch believed there was no need to consult additional sources to confirm his interpretation.<sup>162</sup> The dissent devoted a paragraph to listing all of the reasons why legislative history and statutory purpose are not useful sources of information.<sup>163</sup> Gorsuch sang the standard New Textualist refrain that “[e]ven supposing all this is true, though, when the statute is plain it simply isn’t our business to appeal to legislative intentions.”<sup>164</sup> In other words: “Yes, you may be right. This piece of information points us to a certain decision—but that doesn’t matter because the source is tainted.” It’s an attempt to use pure *rhetoric* to advance an argument instead of a substantive argument.

This did not answer the majority’s argument on the merits. Rather, it’s a rhetorical cop-out that is deployed when the user attacks the source of the

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155. 833 F.3d 1206 (10th Cir. 2016).

156. *TransAm*, 833 F.3d at 1208–09.

157. *Id.*

158. *See id.* at 1210–13.

159. *Id.*

160. *Id.*

161. *See id.* at 1215–17 (Gorsuch, J., dissenting).

162. *Id.*

163. *Id.* at 1217.

164. *Id.* One wonders if legislative intentions could be gleaned from legislative history, but that is beyond the scope of this Comment.

argument. Gorsuch relies on a single dictionary to reach his conclusion that the meaning of the term “operate” is unambiguous.<sup>165</sup> These other sources of information are conflicting and weaken Gorsuch’s conclusion from the single dictionary. His response is merely, “It is a well-documented mistake . . . to assume that a statute pursues its putative (or even announced) purposes to their absolute and seemingly logical ends.”<sup>166</sup> This is not a response to the merits of the majority’s argument. Rather, it’s an ad hominem-style logical failing.

## 2. The LSD Case

The majority opinion by Judge Frank Easterbrook in the “LSD Case” is another example of the ad hominem canon. In *United States v. Marshall*<sup>167</sup> defendants charged with possession of LSD faced draconian minimum penalties due to the wording of the sentencing statute.<sup>168</sup> The statute imposed penalties of “five years for selling more than one gram of a ‘mixture or substance containing a detectable amount’ of LSD, [and] ten years for more than ten grams.”<sup>169</sup> The crux of the issue was whether a single dose of LSD<sup>170</sup> mixed with another substance (such as blotter paper) constituted a “mixture” under the terms of the statute. This had enormous consequences for sentencing, since theoretically, a single dose of LSD, dissolved in a “tumbler of orange juice,”<sup>171</sup> could result in a ten-year mandatory minimum sentence, since it was technically a “mixture.”<sup>172</sup> Consequently, holding a single dose of LSD, depending on the mixture, could increase a sentence from minor possession to a mandatory minimum of ten years in federal prison.

Judge Frank Easterbrook, a New Textualist<sup>173</sup> writing for the majority, read the statute literally. He wrote that “[o]rdinary parlance calls the paper containing tiny crystals of LSD a mixture.”<sup>174</sup> But Judge Easterbrook ignored

165. *Id.* at 1216.

166. *Id.* at 1217.

167. 908 F.2d 1312 (7th Cir. 1990) (in banc) (colloquially known as “the LSD Case”) *aff’d sub. nom.* Chapman v. United States, 500 U.S. 453 (1991).

168. *Marshall*, 908 F.2d at 1314–15; 21 U.S.C. § 841(b)(1)(A)(v)–(B)(v) (2012). The primary defendant at issue was sentenced to a mandatory twenty-year sentence for selling over ten grams of LSD (approximately 11,750 doses). *Marshall*, 908 F.2d at 1314.

169. *Marshall*, 908 F.2d at 1315.

170. LSD is extremely light (the average dose is 0.05 milligrams) and is almost always delivered through another medium. *Id.* at 1315–16.

171. *Id.* at 1315.

172. *Id.* There are also additional consequences. A low-level dealer (a “small-fish”) could technically be charged with significantly higher penalties than a distributor, who may only have pure LSD (since the dealer would have the weighty “mixtures”).

173. Easterbrook, *supra* note 48, at xxi–xxvi. Judge Easterbrook gives a full-throated endorsement of the treatise by Scalia and Garner, stating “[e]very lawyer—and every citizen concerned about how the judiciary can rise above politics and produce a government of laws, and not of men—should find this book invaluable.” *Id.* at xxvi (footnote omitted).

174. *Marshall*, 908 F.2d at 1317.

sources outside the four corners of the text. The overall purpose of the statute was to “punish major drug traffickers more harshly than minor participants.”<sup>175</sup> Subsequent legislative history demonstrated that Congress did not intend the illogical result of the statute.<sup>176</sup> Even the Sentencing Commission was not sure if LSD should be punished by weight or dose and asked Congress for further guidelines.<sup>177</sup> For PCP, a drug distributed in a similar manner to LSD, “Congress specified alternative weights, for the drug itself and for the substance or mixture containing the drug.”<sup>178</sup> Not persuaded by these sources outside the text, the court upheld the sentences, despite the illogical outcome that was likely contrary to the results intended by the drafters.<sup>179</sup>

The opinion by Judge Easterbrook deployed the ad hominem canon: it was willfully blind to the broad purpose of the statute, later legislative history, and the illogical outcome. Although the opinion briefly acknowledged some of the congressional developments, it stated, “subsequent debates are not a ground for avoiding the import of enactments.”<sup>180</sup> This is not a response to the *merits* of the argument raised by the two dissenting opinions. Rather, it is an ad hominem-style rhetorical attack on the *source* of their information. Later legislative developments, while not by any means controlling, may be a source of information that demonstrates congressional intent. As “faithful agents” of the legislature,<sup>181</sup> any source of information that might shed light on the intent of the legislature would appear to be useful. Judge Easterbrook further stated, “[j]udges assess the validity of legislative decisions; we do not assign grades to legislative deliberations. . . . Even laws that resulted from mistakes in the drafting process or ignorance in the halls of Congress survive if a rational basis may be supplied for the result.”<sup>182</sup> Judge Easterbrook said this because it was an easier answer than engaging with the dissents on their merits. He used rhetoric to ignore the dissenters’ arguments based in nontextual sources and covered up the deficiencies in his own argument.

### 3. The “Unknowing” Felon Case

*United States v. Games-Perez*<sup>183</sup> involved a question about 18 U.S.C. § 922(g)(1), which prohibits felons from knowingly possessing firearms.<sup>184</sup> The question at issue was whether the mens rea requirement of knowledge

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175. *Id.* at 1330 (Cummings, J., dissenting).

176. *See id.* at 1327–28.

177. *Id.*

178. *Id.* at 1332 (Posner, J., dissenting).

179. *See id.* at 1314–15, 1326 (majority opinion).

180. *Id.* at 1318.

181. This is how New Textualists often view the role of the court—“faithful agents” of the legislature. SCALIA & GARNER, *supra* note 1, at 22–23.

182. *Marshall*, 908 F.2d at 1325.

183. 667 F.3d 1136 (10th Cir. 2012).

184. *Id.* at 1137.

also applied to the felony requirement<sup>185</sup>—that is, whether the government needed to prove that the defendant actually *knew* he was a felon in order to get a conviction. The majority held there was no knowledge requirement for felony status and affirmed the conviction.<sup>186</sup>

Concurring in judgment, then-Judge Gorsuch deployed the ad hominem canon and summarily dismissed the Fourth Circuit's interpretation of the statute,<sup>187</sup> since it “wage[d] an epic battle not on the field of plain language but congressional intent.”<sup>188</sup> He continued and declared that the Fourth Circuit's “extensive back-and-forth barrages ultimately serve to illustrate only that the relevant legislative history is stocked with ample artillery for everyone.”<sup>189</sup> This shows usage of the ad hominem canon, since he refused to engage in any sort of analysis or explanation about the argument advanced from the Fourth Circuit decision. Rather, then-Judge Gorsuch stated, “Whatever Congress's *intent* may have been, any statutory interpretation must take reasonable account of the language Congress *actually adopted*.”<sup>190</sup> Indeed, he made his point clear: your analysis does not matter and will (and *should*) be ignored if based on legislative history or statutory purpose. This is not a response to the argument of the Fourth Circuit on the *merits*. Rather, it's an attack on the *process* and *source* of their decision. Justice Gorsuch, like Scalia before him, chose to assault the use of legislative history instead of responding to the actual arguments.

From the LSD Case to *Games-Perez*, these examples show New Textualists deploying the ad hominem canon by refusing to engage with the merits of an opposing side because of the source of their arguments. This makes sense: outside sources of information may often conflict with a New Textualist interpretation of a given term or phrase. It's easier (and appears more persuasive) to claim that the entire *source* of information is illegitimate and not worth engaging. But in the end, using the ad hominem canon is a rhetorical trick, not a substantive argument.

### C. The “Cocktail Party Canon”

New Textualists often claim that their approach stays true to the most “ordinary,”<sup>191</sup> “plain,”<sup>192</sup> or “fair”<sup>193</sup> meaning of a given statutory text. In

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185. *Id.*

186. *Id.*

187. *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995) (en banc).

188. *Games-Perez*, 667 F.3d at 1144 (Gorsuch, J., concurring in the judgment).

189. *Id.*

190. *Id.*

191. SCALIA & GARNER, *supra* note 1, at 69–77 (the “Ordinary-Meaning Canon”).

192. *Id.* app. B at 436 (“The doctrine that if the text of a statute is unambiguous, it should be applied by its terms without recourse to policy arguments, legislative history, and any other matter extraneous to the text . . .”).

193. *Id.* at 33 (“The interpretive approach we endorse is that of the ‘fair reading’: determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was

other words, New Textualists claim that their interpretation, interpretive method, and result would be easy to understand in a lay context and is the fairest reading of the statute. This is the “cocktail party canon,” derived from Justice Scalia’s famous quip about finding interpretations that would make “sense at a cocktail party without having people look at you funny.”<sup>194</sup> One of the principle canons in *Reading Law* is the “Ordinary-Meaning Canon,” which tells users that “[w]ords are to be understood in their ordinary, everyday meanings.”<sup>195</sup>

Claiming a “plain meaning” is a rhetorical tactic that allows New Textualists to claim the interpretive high ground. The framework includes the cocktail party canon, since it appeals to the fantasy of a simple plain meaning understood by an average person. But simple does not always mean correct. There may be *multiple* simple readings of a statute. New Textualists deploy this canon in an attempt to shut down the flow of information that contradicts their position.<sup>196</sup> By claiming that their method has the “plainest” reading of the provision at issue, New Textualists see no need to address supplemental information that might call their proposition into question.<sup>197</sup> When the text is plain (at least in the mind of the New Textualist), the inquiry reaches its end. But New Textualists fail to understand that what may be very plain to them and their friends at a high-end cocktail party may not be so plain to others. A term with obvious meaning to Justice Scalia may have an entirely different meaning to a bar full of truckers.<sup>198</sup> A meaning is only plain in the eye of the beholder.

### 1. The Chemical “Warfare” in Pennsylvania Case

*Bond v. United States*<sup>199</sup> is an unusual and somewhat bizarre case. After attempting to harass her husband’s paramour (Myrlinda Haynes) with chemical irritants,<sup>200</sup> a woman (Ms. Carol Ann Bond) was charged with violating the Chemical Weapons Convention Implementation Act.<sup>201</sup> The Act, as its name suggests, is designed to implement an international ban on

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issued.”); *see also id.* at 356 (“the fair meaning of the text” is the “textualist’s touchstone” (emphasis omitted)).

194. *Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

195. SCALIA & GARNER, *supra* note 1, at 69.

196. *See, e.g., infra* Sections II.C.1, II.C.2, II.C.3.

197. *Id.*

198. *See supra* Section II.B.1 (the *TransAm* trucking case is an excellent example of how a term may be interpreted differently in different circles).

199. 134 S. Ct. 2077 (2014).

200. Although the chemicals used by Bond could be lethal in high doses, the parties agreed “that Bond did not intend to kill [the paramour].” *Id.* at 2085.

201. *Id.* The Chemical Weapons Convention Implementation Act is the domestic legislation that enacts the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. *Id.* at 2083. The Convention was in response to a longstanding horror at the use of chemical weapons during warfare, most recently highlighted by the Iraqi Army’s use during the Iran-Iraq War. *Id.* at 2083–84. The domestic Act



chemical weapons in warfare.<sup>202</sup> In this case, one of the chemicals Ms. Bond used was available to purchase on Amazon.com, the other she obtained at the lab where she worked.<sup>203</sup> While both chemicals could be fatal at high enough doses, it was undisputed that Ms. Bond's goal was to give Ms. Haynes "an uncomfortable rash."<sup>204</sup> The chemicals Ms. Bond used were so benign that over an eight-month period, Ms. Bond's twenty-four attempts to injure Ms. Haynes resulted in one minor chemical burn, which Ms. Haynes treated with running tap water.<sup>205</sup> On its face, the case against Ms. Bond was fairly simple, since she "'knowingly' 'use[d]' a 'chemical weapon' in violation of section 229(a)."<sup>206</sup> Further, "[t]he chemicals that Bond placed on Haynes's home and car are 'toxic chemical[s]' as defined by the statute, and Bond's attempt to assault Haynes was not a 'peaceful purpose.'"<sup>207</sup> Although the Court unanimously decided that the Act did not apply to Ms. Bond, the reasoning splintered the justices.<sup>208</sup> Chief Justice Roberts, writing for the majority, found ambiguity in the statute and applied a federalism-avoidance construction.<sup>209</sup> Justice Scalia, however, filed a concurrence on different grounds.<sup>210</sup>

This concurrence by Justice Scalia in *Bond* exemplified the cocktail party canon, since the late justice advocated an obvious "plain meaning" of the term "chemical weapon" while accusing the plurality of being in a "result-driven antitextualism [fog]."<sup>211</sup> The first header in his opinion is titled the "Unavoidable Meaning of the Text"<sup>212</sup> and he finds the statute "utterly

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Forbids any person knowingly 'to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.' 18 U.S.C. § 229(a)(1). It defines 'chemical weapon' in relevant part as '[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.' § 229F(1)(A). 'Toxic chemical,' in turn, is defined in general as 'any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.' § 229F(8)(A). Finally, 'purposes not prohibited by this chapter' is defined as '[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity,' . . .

*Id.* at 2085.

202. *Id.* at 2083–85.

203. *Id.* at 2085.

204. *Id.*

205. *Id.*

206. *Id.* at 2088 (first quoting 18 U.S.C. § 229(a); then quoting *id.*; then quoting *id.* § 229F(1)).

207. *Id.* (first quoting 18 U.S.C. § 229F(1) (2012); then quoting § 229F(8); and then quoting § 229F(7)).

208. *Id.* at 2083–2111.

209. *Id.* at 2088–93.

210. *Id.* at 2094–2102 (Scalia, J., concurring in the judgment).

211. *Id.* at 2094–95.

212. *Id.* at 2094.

clear.”<sup>213</sup> Justice Scalia argued that the “meaning of the Act is *plain*” and “[a]pplying [the Act’s] provisions to this case is hardly complicated . . . Bond violated the Act.”<sup>214</sup> In Justice Scalia’s view, someone might look at you funny at a cocktail party if you told them that a chemical weapons treaty does not cover a woman in Pennsylvania who ordered a chemical used to clean lab equipment from Amazon. Justice Scalia only escaped the result of the “utterly clear” text by voiding the statute on constitutional grounds.<sup>215</sup>

But the meaning of the term “chemical weapon” is not so clear. A unanimous Court (although divided on the reasoning) found that the Act did *not* apply to Ms. Bond.<sup>216</sup> Justice Scalia, though, through the use of the cocktail party canon, avoided what the statute, implementing a multinational treaty drafted in response to horrific acts of war, was designed to prevent: the spread of chemical *weapons*. By deploying the cocktail party canon, Justice Scalia argued that the chemical weapons statute applied to a domestic dispute in Pennsylvania and that *his* method of interpretation supplied the one true plain interpretation.

## 2. The Return of the Frozen Trucker

Then-Judge Gorsuch’s dissent in *TransAm* also used the cocktail party canon. As described in Section II.B, the question turned on the interpretation of the word “operate” within a whistleblowing provision of a federal safety statute. While the majority, an administrative law judge, and the Department of Labor all found the term to be undefined and ambiguous, Judge Gorsuch found the statute to be “perfectly plain.”<sup>217</sup> Judge Gorsuch used this “perfect plainness” to reach the “only” possible meaning of the statute: refusing to “operate” only covers a *literal* refusal to operate the truck.<sup>218</sup> In other words, unless the trucker sat in his freezing cab and risked death while the temperature continued to plunge, he was not covered by the statute’s protections.

This is a clear usage of the cocktail party canon, since then-Judge Gorsuch believed his single literalist definition was the obvious and *only* “plain meaning” of the statute.<sup>219</sup> Any other definition fell outside the realm of the text and was impermissible, or so the argument goes.<sup>220</sup> This again ignored the statutory-purpose and common-sense notion that refusing to wait in a freezing cab and potentially dying from hypothermia is encompassed by the

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213. *Id.* at 2096.

214. *Id.* at 2094 (emphasis added).

215. *Id.* at 2098–2102.

216. *See id.* at 2082.

217. *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1216 (10th Cir. 2016).

218. *Id.*

219. *See id.* at 1215–17.

220. *Id.*

term “refusal to operate.”<sup>221</sup> Gorsuch never addressed why a refusal to “operate” in the *proscribed manner* is not an additional possible meaning of the statute (and creates ambiguity). But, since Gorsuch used the cocktail party canon to find this meaning so plain, he avoided addressing these arguments.

The forceful rhetoric of this opinion glosses over the substantive questions. Then-Judge Gorsuch ignored other perspectives and ignored the fact that this definition might cause him to get “funny looks” at any cocktail party not made up of Supreme Court justices. The meaning of a given word or phrase is only plain when the audience is composed of like-minded people.

### 3. “Lawyer, Dog”

A recent concurrence in a denial of certiorari in the Louisiana Supreme Court also uses the cocktail party canon and shows the dangers of using a New Textualist mindset to discern plain meaning.<sup>222</sup> When judges are empowered to decide the “plain meaning” based on their *own* perspective, they lose touch with other perspectives outside their cocktail parties. In *Demesme*, a suspect in custody stated, “just give me a lawyer dog.”<sup>223</sup> But the court found this to be an ambiguous request for counsel.<sup>224</sup> In his concurrence to the denial of certiorari, Justice Crichton stated, “the defendant’s ambiguous and equivocal reference to a ‘lawyer dog’ does not constitute an invocation of counsel.”<sup>225</sup>

*This is absurd.* The only way this statement is ambiguous or equivocal is if the court believes the suspect was asking for a dog with a law degree. New Textualists, by encouraging judges to determine “plain meaning” based on dictionary definitions and their own perspectives, rather than requiring additional outside considerations,<sup>226</sup> create a dangerous precedent that seriously impacts the lives of people before courts.

A belief in a plain meaning presupposes there *is* a plain meaning. But English is composed of many dialects, and Supreme Court justices (and judges in general) likely only speak one or two of them.<sup>227</sup> These dialects emerge based on diverse factors such as race, class, and age. For example, linguists identify a separate dialect from Standard English spoken by some

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221. *Id.* at 1213.

222. *State v. Demesme*, 228 So. 3d 1206, 1206 (Crichton, J., concurring).

223. *Id.* Mr. Demesme’s full statement was, “if y’all, this is how I feel, if y’all think I did it, I know that I didn’t do it so why don’t you just give me a lawyer dog cause this is not what’s up.” *Id.*

224. *Id.*

225. *Id.*

226. Such as, in this example, how slang works.

227. A focus on plain, stilted English imposes a disproportionate impact on those who speak a different dialect, due to class or race. Heather Pantoga, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601, 638–39 (1999).

African-Americans as African-American Vernacular English.<sup>228</sup> As a result, while asking for a “lawyer, dog” may be “ambiguous” and “equivocal” in Justice Crichton’s dialect,<sup>229</sup> it may be clear-cut in another. In the words of Justice Scalia, “he who lives by the *ipse dixit* dies by the *ipse dixit*.”<sup>230</sup>

#### D. *And One More Example for the Road*

One final example is Justice Scalia’s dissent in *King v. Burwell*,<sup>231</sup> where he deployed both the ad hominem and cocktail party canons. *King v. Burwell* was the landmark case that upheld the Affordable Care Act’s (ACA) tax credits for federally established exchanges.<sup>232</sup> The issue boiled down to whether the ACA’s statutory phrase “an Exchange established by the State”<sup>233</sup> included exchanges established by the federal government for a recalcitrant state<sup>234</sup> and whether individuals on these exchanges were eligible for tax credits.<sup>235</sup> If “an Exchange established by the State” excluded the federal exchanges, the entire ACA regime would likely have fallen apart.<sup>236</sup> Consequently, the Court—in light of the language of the other parts of the ACA,<sup>237</sup> practical realities,<sup>238</sup> and the overall statutory scheme—found the term to ambiguous.<sup>239</sup> This ambiguity allowed the majority to hold that the term “[e]stablished by the state” encompassed both state and federal exchanges—which therefore permitted the use of tax credits on all exchanges.<sup>240</sup> This decision effectively saved the ACA.<sup>241</sup>

Justice Scalia, in a fiery dissent, vehemently disagreed; he deployed both the cocktail party canon to reject the majority’s conclusion that the text was

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228. *Id.*; see also Geoffrey K. Pullum, *African American Vernacular English is Not Standard English with Mistakes*, in *THE WORKINGS OF LANGUAGE* 39, 45 (Rebecca S. Wheeler ed., 1999) (“[African American Vernacular English] as a dialect of English still deserves respect and acceptance. It has a degree of regularity and stability attributable to a set of rules of grammar and pronunciation, as with any language. It differs strikingly from Standard English, but there is no more reason for calling it bad Standard English than there is for dismissing Minnesota English as bad Virginia Speech, or the reverse.”).

229. *Demmesme*, 228 So. 3d at 1206.

230. *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

231. 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting).

232. See *Id.* at 2496 (majority opinion).

233. 42 U.S.C. § 18031 (2012).

234. A state that refused to set up their own exchange. *King*, 135 S. Ct. at 2485.

235. 26 U.S.C. § 36B(a)–(c) (2012); *King*, 135 S. Ct. at 2488.

236. *King*, 135 S. Ct. at 2496 (“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.”).

237. “[S]everal provisions that assume tax credits will be available on both State and Federal Exchanges.” *Id.* at 2491.

238. See *id.* at 2492–93 (noting that the statute contained numerous “examples of inartful drafting”).

239. *Id.*

240. *Id.* at 2495–96.

241. Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court’s Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 207 (2016).

ambiguous and the ad hominem canon to resist their appeal to statutory purpose. For the cocktail party canon, Justice Scalia believed that the *only* plain meaning was the tax credits did not apply to federally established exchanges.<sup>242</sup> He stated that the meaning of the provision was “so obvious there would hardly be a need for the Supreme Court to hear a case about it.”<sup>243</sup> And, “[w]ords no longer have meaning if an Exchange that is *not* established by a State is ‘established by the State.’”<sup>244</sup> He further stated, “[u]nder all the usual rules of interpretation, in short, the Government should lose this case.”<sup>245</sup> What Justice Scalia meant by this sentence, of course, was under all of *his* rules of interpretation the government should lose this case. By deploying the cocktail party canon, Justice Scalia stated that his approach provides the one, true plain meaning—and any other approach provides a fatally flawed and *illegitimate* interpretation.

As for the ad hominem canon deployment, Justice Scalia was also willfully blind to the significant ramifications of his interpretation. He started off by saying that “[s]tatutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision” to let the world know this entire exercise was illegitimate.<sup>246</sup> After getting that out of the way, Justice Scalia then briefly attempted to discount his statute-killing interpretation: “[i]f true, these projections would show only that the statutory scheme contains a flaw.”<sup>247</sup> But this was no ordinary flaw; it was a *fatal* one. Thirty-four states did not set up their own exchanges and required the federal fallback.<sup>248</sup> Gutting the federal subsidies for these thirty-four states would have doomed the ACA.<sup>249</sup> Justice Scalia, in response to this concern by the majority, responded by saying that the disastrous economic and public health results of his opinion would spur previously recalcitrant states to set up an exchange.<sup>250</sup> And “[t]hat reality destroys the Court’s pretense that applying the law as written would imperil ‘the viability of the entire Affordable

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242. *King*, 135 S. Ct. at 2496 (Scalia, J., dissenting).

243. *Id.*

244. *Id.* at 2497.

245. *Id.*

246. *Id.* at 2502.

247. *Id.* at 2503.

248. Robert Barnes, *Affordable Care Act Survives Supreme Court Challenge*, WASH. POST (June 25, 2015), [https://www.washingtonpost.com/politics/courts\\_law/obamacare-survives-supreme-court-challenge/2015/06/25/af87608e-188a-11e5-93b7-5eddc056ad8a\\_story.html?utm\\_term=.9bb02635f9ab&nooredirect=on](https://www.washingtonpost.com/politics/courts_law/obamacare-survives-supreme-court-challenge/2015/06/25/af87608e-188a-11e5-93b7-5eddc056ad8a_story.html?utm_term=.9bb02635f9ab&nooredirect=on) [<https://perma.cc/F74W-A4V7>].

249. Adrianna McIntyre & Sarah Kliff, *King v. Burwell Could Have Gutted Obamacare in 34 States*, VOX (June 25, 2015, 5:01 PM), <https://www.vox.com/cards/obamacare-subsidies-law-suit/what-is-the-case> [<https://perma.cc/8G3L-VWMD>].

250. *King*, 135 S. Ct. at 2504 (Scalia, J., dissenting).

Care Act.’”<sup>251</sup> But Justice Scalia does not provide any evidence for his suggestion that states that had resisted setting up an exchange with free federal money in the past would change their minds.<sup>252</sup>

Justice Scalia deployed both the ad hominem and the cocktail party canon in an attempt to destroy a massive piece of legislation that provided healthcare to millions over a typo.<sup>253</sup> He ignored the reality that the cutoff of federal tax subsidies would cause a corresponding drop of healthy people in the insurance pool, causing a “death spiral” and the collapse of the market.<sup>254</sup> This is New Textualism at its worst—formalistic, literalistic, and divorced from context.

### CONCLUSION

The repercussions for the rhetoric of New Textualists are varied. For one, the use of legislative history by the Supreme Court has dropped precipitously since the 1980s.<sup>255</sup> In response to this loss of information, the Court has contemporaneously increased its use of semantic canons.<sup>256</sup> But this rise of canon usage and New Textualist philosophies has not brought along any added stability or predictability.<sup>257</sup> The sheer number of the canons of interpretation available for judges creates significant judicial flexibility and undermines the core tenets of New Textualism.

Unfortunately, there is no easy solution to the rhetorical problem exposed by the framework in Part II. New Textualists, led by the late Justice Antonin Scalia, waged a long and bitter war against nontextual sources of information.<sup>258</sup> As of today, their fierce rhetoric appears to have carried the day.<sup>259</sup>

To fight this, courts and commentators should resist the use of the rhetorical canons by New Textualists. This does not mean ignoring the semantic and substantive canons. Rather, this involves pointing out that the use of the

251. *Id.* (quoting *id.* at 2495 (majority opinion)).

252. Jon Healey, *Will States Create Health Insurance Exchanges After King v. Burwell?*, L.A. TIMES (June 25, 2015, 4:47 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-will-states-create-health-insurance-exchanges-after-king-vs-burwell-20150625-story.html> [https://perma.cc/52F6-9XSH] (“Republican-dominated governments didn’t want to do anything that might sustain Obamacare.”).

253. Michael Scherer, *Supreme Court Rules that a Typo Should Not Undo Obamacare*, TIME (June 25, 2015), <http://time.com/3935707/supreme-court-obamacare-affordable-care/> [https://perma.cc/SNC6-EE3F].

254. See McIntyre & Kliff, *supra* note 249.

255. See Mendelson, *supra* note 11 (manuscript at 3) (citing Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 270 (2013) (noting that the number of opinions citing legislative history has dropped by more than half)).

256. See *supra* note 11 and accompanying text.

257. See Mendelson, *supra* note 11 (manuscript at 6).

258. See *supra* Part II (this Comment details some of Justice Scalia’s numerous opinions where he attacks even the slightest deviation from New Textualist principles).

259. See *supra* Part II; see also *supra* note 11 and accompanying text.

*rhetorical* canons by New Textualists is not an effective mode of argumentation. Instead of bowing down to the blistering rhetoric of New Textualists, intentionalists, purposivists, and other proponents of generally accepted methods should point out the logical failings of the New Textualist method of interpretation. Pointing out these logical deficiencies may not have an immediate impact. But over time it may reduce the appeal of the New Textualist approach and blunt the force of their rhetoric.<sup>260</sup>

There are difficulties inherent in this proposal, especially as New Textualism continues to take hold within the ranks of the judiciary. It will likely take significant time and determination for proponents of other generally accepted methods to gain ground. It may require a solution like a codified method of interpretation, as several states are experimenting with.<sup>261</sup> And it will likely require the engagement of New Textualists themselves.

All of this rhetoric causes lasting damage. New Textualists waged total war on the opposition and scorched the earth as they ascended to power. But American jurisprudence as a whole would be better served if the proponents of New Textualism engaged with its weaknesses, rather than attacking other methods as unprincipled and illegitimate. New Textualists should seek to join the debate, not shout over it.

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260. An example of the blunt force of New Textualist rhetoric is Justice Scalia's words from a footnote to *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting): "If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie." *Id.* (quoting *id.* at 2593 (majority opinion)).

261. See Gluck, *supra* note 12.